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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-33

ALDENS, INC.,
Petitioner,

VERSUS

PATRICK C. RYAN, Administrator of Consumer Affairs for the State of Oklahoma,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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BRIEF IN OPPOSITION

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Respondent Patrick C. Ryan submits this brief in opposition to Aldens' Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (A23-A27)[1] is reported at 571 F.2d 1159; the opinion of the United States District Court for the Western District of Oklahoma (A1-20) has not yet been officially reported.

[1] References herein to "A" pages are to the Appendix found in Aldens' Petition at pages A1-A30.

QUESTIONS PRESENTED

1. Is the interest of a State in protecting its citizens from credit abuse sufficient to overcome a Due Process challenge to a statute which, pursuant to that interest, sets a maximum interest rate ceiling?

2. Does the imposition of a State's maximum interest rate ceiling on an interstate mail order seller constitute a burden on commerce which is undue and thereby violative of the Commerce Clause?

STATEMENT OF THE CASE

Nature of the Case

This is one of three identical cases brought by Aldens urging that the imposition on Petitioner of substantially similar State laws setting maximum interest rate ceilings violates the Commerce Clause of Article I, Section 8, and the Fourteenth Amendment of the United States Constitution. The Third and Seventh Circuit Courts of Appeal have, in the two previous cases, upheld the constitutionality of the usury laws of Pennsylvania and Wisconsin, respectively, as they relate to Aldens' activities in those States. This Court has twice refused to hear Petitioner's challenge of the Circuit Courts' opinions. See, *Aldens, Inc.* v. *Packel*, 524 F.2d 38 (3rd Cir. 1975), *cert. denied* 425 U.S. 943; *Aldens, Inc.* v. *LaFollette*, 552 F.2d 745 (7th Cir. 1977), *cert. denied* 434 U.S. 880.

This action was first brought in the United States District Court for the Western District of Oklahoma in June, 1975, challenging the constitutionality of Section

1-201 and 1-201A of the Oklahoma Uniform Consumer Credit Code. The relevant language from those sections is set out at pages 2, 3, and 4 of Aldens' Petition. District Judge Fred Daugherty upheld the Oklahoma law in a Memorandum Opinion (A1-A20) issued June 14, 1976. The United States Court of Appeals for the Tenth Circuit affirmed the District Court in its opinion issued February 27, 1978.

Facts of the Case

This Court may possibly misapprehend the implication of certain non-record conclusions drawn by Petitioner in its "Statement" (Aldens' Petition, pages 4-7) and in its argument (Aldens' Petition, pages 8-16) urging the granting of the Writ. Non-record statements are found at pages 5, 9, 11 and 14 wherein Petitioner implies that the rate of interest charged Aldens' Oklahoma customers is necessarily higher because these consumers are poor credit risks and, because of their poor risk status, are unable to obtain credit at the lower Oklahoma rate. There exists not one scintilla of evidence, nor even a passing inference in the record of this case which would substantiate such an unfortunate implication.

The following facts are drawn from the STIPULATION OF FACTS filed in the District Court below on November 24, 1975.

1. Aldens, Inc. ("Aldens"), is an Illinois corporation with its only physical location in Chicago, Illinois. Aldens is a general retail mail order firm, selling merchandise to residents of all fifty States.

2. For the year next preceding the filing of this litigation, Aldens' sales to Oklahoma customers totalled $2,-051,000.00, approximately 81 per cent being credit sales. The average balance of an Oklahoma customer is approximately $176.00.

3. Aldens does not have a physical location, employees or agents, and does not own any property in Oklahoma.

4. Aldens solicits its Oklahoma customers entirely by mail, with such solicitations being directed to about 220,000 Oklahomans per year.

5. In determining creditworthiness, approximately twenty-two per cent (22%) of the credit applications are checked against a national credit index located in New Jersey. Also, approximately twenty-three per cent (23%) of the applications are checked by arrangement with a Chicago, Illinois, credit reporting agency, which gets its information by telephoning any of various affiliated credit bureaus located in approximately sixty (60) cities and towns in Oklahoma. Additionally, some telephone calls are made by Aldens' personnel directly to three Oklahoma credit bureaus.

6. Aldens is not required to qualify or register to do business in Oklahoma, nor is it required to collect and remit the Oklahoma use tax.

7. Section 1-201A of the Oklahoma Credit Code (Aldens' Petition, page 4), which section allows interstate traders such as Aldens to impose an annual percentage rate of finance charge no greater than other Oklahoma creditors, became effective May 13, 1975.

8. The maximum interest rate allowed by the Oklahoma law on revolving credit accounts, such as are used by Petitioner, is eighteen per cent (18%). Prior to January 1, 1976, the rate of finance charge imposed by Aldens, at least on balances of $350.00 or less, was twenty-one per cent (21%). At that time, and pending final judgment in this action, Aldens determined to comply with the Oklahoma law in this regard.

9. Pursuant to affidavits sworn by responsible Aldens' personnel, it is stipulated that the annual cost to Aldens of complying with the Oklahoma law is approximately $160,500.00. Of this total, approximately $114,000.00 is the result of additional advertising and catalog costs and extra computer costs. The remaining $46,500.00 is the resulting loss in finance charge revenue.

THERE IS NO REASON TO GRANT THE WRIT

Although this Court has jurisdiction to grant a Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals, there is no reason to do so. This case does not meet the criteria set forth in sub. 1(b) of Rule 19, Supreme Court Rules, as considerations governing review of a Court of Appeals decision on certiorari. The decision of the court below is in accord with two other Courts of Appeal on the same matter and is fully consistent with all applicable decisions of this Court.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY HELD THAT THE DUE PROCESS CLAUSE DOES NOT BAR THE STATE OF OKLAHOMA FROM PRESCRIBING MAXIMUM INTEREST RATES WHICH MAY BE CHARGED OKLAHOMA RESIDENTS IN MAIL ORDER CREDIT SALES.

In its review and analysis of Aldens' Due Process challenge to the section of the Oklahoma Uniform Consumer Credit Code at issue here, the Court of Appeals adopted the teaching of *Travelers Health Ass'n.* v. *Virginia*, 339 U.S. 643 (1950), which, posits the Court of Appeals:

> " 'rejected the contention' that the doctrines of place of contracting and place of performance should govern, and held that they must give way to the 'degree of interest' the state had in the transaction of the subject, and give way to the consequences of the contracts in the regulating states." *Aldens* v. *Ryan* (*supra*), at 1161 (A25-26). *Also citing Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943).

The Tenth Circuit Court of Appeals thus accurately identified, as did the District Court below and the Courts of Appeal for the Third and Seventh Circuits in *Packel* (*supra*), and *LaFollette* (*supra*), the Due Process test to be an interest analysis approach which focuses upon the interest of the State sufficient to "justify *any* exercise of sovereignty in connection with the transaction in dispute." *Packel* (*supra*), at 42. Also see *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 (1957); and, *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945).

The interest analysis approach thus proffered by this Court has been applied by other courts in sustaining the Due Process constitutionality of state regulations affecting other mail order operations. *See*, for example, *People* v. *Fairfax Family Fund, Inc.*, 47 Cal.Rptr. 812, 235 Cal.App.2d 881 (1965), *appeal dismissed* (for want of a substantial federal question) 382 U.S. 1 (1965), which upheld California's regulation of mail order loan transactions between a Kentucky based firm and residents of California; *Minister's Life & Casualty Union* v. *Haase*, 30 Wis.2d 339, 141 N.W.2d 287 (1966), *appeal dismissed* (for want of a substantial federal question) 385 U.S. 205 (1966), and *United National Life Insurance Co., et al.* v. *California*, 58 Cal.Rptr. 599, 427 P.2d 199 (1967), *appeal dismissed* (for want of a substantial federal question) 389 U.S. 330 (1967), which upheld Wisconsin and California regulations of mail order insurance transactions between foreign corporations and residents of those states; and *State of Washington* v. *Reader's Digest Ass'n., Inc.*, 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed* (for want of a substantial federal question) 411 U.S. 945 (1973), which upheld the application of the State of Washington's Consumer Protection Act to the mail solicitations of Reader's Digest.

Petitioner relies heavily on *National Bellas Hess* v. *Department of Revenue*, 386 U.S. 753 (1967), to bolster its contention that the Due Process Clause invalidates Oklahoma's interest rate ceiling as it relates to out-of-state mail order merchandisers. There this Court held unconstitu-

tional an Illinois statute imposing a duty on an out-of-state mail order firm to collect the Illinois use tax. The tax aspect of that case, however, places it in a neutral category, not supportive of Aldens' theories, nor in conflict with the "interest analysis" approach above. At least since 1946, it has been recognized, as Mr. Justice Frankfurter spoke in *Freeman* v. *Hewitt*, 329 U.S. 249, 91 L.Ed. 265 (1946):

> "A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests . . . attempts at . . . taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce." 329 U.S. at 253.

All of the Courts, those in Pennsylvania, Wisconsin and Oklahoma, and the Courts of Appeal for the Third, Seventh and Tenth Circuits, when confronted with the issues raised by Petitioners here, have recognized the States' sovereign protective interests in protecting their respective citizens from the imposition of excessive rates of finance charges. The *LaFollette (supra)* Court was very succinct in recognizing the Wisconsin law at issue there to be:

> ". . . a measure to safeguard members of the public desiring to secure [goods] by [credit], who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses." *Aldens* v. *LaFollett (supra)*, at 751, citing *California* v. *Thompson*, 313 U.S. 109, 112-113, 61 S.Ct. 930, 932, 85 L.Ed. 1219 (1940).

The Oklahoma Statute, expressive of the State's clear duty and substantial interest in so protecting its citizens

from excessive interest rates is not violative of Due Process, nor is such regulation inconsistent with the decisional authority of this Court, and therefore, need not be reviewed by this Court.

II.

THE COURT OF APPEALS PROPERLY HELD THAT THE IMPOSITION BY OKLAHOMA OF A MAXIMUM INTEREST RATE CEILING ON MAIL ORDER CREDIT SALES DOES NOT CONSTITUTE AN UNDUE, AND CONSTITUTIONALLY IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

Petitioner contends it is an interstate trader engaged in pure interstate commerce and is, therefore, *per se* exempted from State regulation. Properly rejecting the *per se* approach, in favor of a balancing of the interests involved,[2] the Tenth Circuit Court of Appeals added:

> "The States can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits." *Aldens* v. *Ryan (supra)*, at 1162(A-26).

Also, see *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Great Atlantic and Pacific Tea Company, Inc.* v. *Cottrell*, 424 U.S. 366,

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[2] The balancing approach was most recently recognized by this Court in the case of *Raymond Motor Transportation, Inc.* v. *Rice*, ... U.S. ...., ..., 46 U.S.L.W. 4109 (1978). Although the roles were reversed and it was the State seeking to avoid the balancing, this Court, nevertheless, said ". . . we cannot accept the . . . contention that the inquiry under the Commerce Clause is ended *without a weighing* of the [interest of the State] against the degree of interference with interstate commerce." 46 U.S.L.W. 4113 (Emphasis added).

96 S.Ct. 923, 47 L.Ed.2d 55 (1976); *Head* v. *New Mexico Board*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963).

Petitioner's contention is that any State regulation of the "purely interstate activities" of a foreign corporation is invalid. That position and its corollary (*i.e.* States are totally helpless to regulate any activity of a foreign corporation, regardless of any harmful effects of that activity) are entirely without merit. For, as Mr. Chief Justice Stone opined in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945):

> ". . . in the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." 325 U.S. at 767.

The most cogent analysis directly on point with the case at bar is that made by the Third Circuit Court of Appeals in *Aldens, Inc.* v. *Packel* (*supra*), the first of the three lawsuits challenging the identical application of laws substantially similar to those at issue here. The *Packel* guidelines were subsequently adopted by the Circuit Court of Appeals in *Aldens, Inc.* v. *LaFollette* (*supra*), the District Court below and the Court of Appeals in the instant case.

Recognizing the need for a workable analytical structure with which to deal with Commerce Clause issues of the type at bar, and to avoid the ". . . futile exercise of color-matching the stipulated facts in [a] case to the Commerce Clause cases which appear to glow with the most nearly similar hue," *Packel* (*supra*), at 45, the *Packel* Court

suggests that a State's choice of law is limited by the Commerce Clause to the extent:

1. The area of the law is one in which Congress has already made its own choice of law; or
2. The area of the law is one in which Congress has not made its own choice of law; but
   a. despite Congressional inaction, the area of law requires national uniformity; or
   b. The State's choice of law discriminates against interstate commerce; or
   c. the State law in question imposes a burden on interstate commerce in excess of any value attaching to the State's interest in imposing the regulation. (footnotes omitted) *Aldens, Inc.* v. *Packel* (*supra*), at 45, 46.

In the light of Congressional enactment of the Federal Consumer Credit Protection Act (15 U.S.C. § 1610 *et seq.*), there exists little question that Congress not only considered but expressly rejected the proposition that it replace the States' choices of law with its own, at least in the area of the setting of maximum interest rate ceilings.[3] The appropriateness of State police power regulation of interest rates was recognized by the Courts even long before Congress made its consideration and determination. *See, Grif-*

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[3] "This title *does not otherwise annul, alter, or affect* in any manner the meaning, scope or applicability of the *laws of any State*, including, but not limited to, laws *relating to the types, amounts or rates of charges* or any element or elements of charges permissible under such laws in connection with the extension or use of credit . . ." 15 U.S.C. §1610(b) (Emphasis added).

fith v. *State of Connecticut,* 218 U.S. 563, 54 L.Ed. 1151; *Equitable Credit and Discount Co.* v. *Greer,* 342 Pa. 445, 21 A.2d 53 (1941); and more recently, *Oxford Consumer Discount Co.* v. *Stefanelli,* 246 A.2d 460, *appeal dismissed* 400 U.S. 808, *rehearing denied* 400 U.S. 923 (1970); *Aldens, Inc.* v. *Packel* (*supra*), at 48. It is respectfully suggested that, although its power to do so is unquestioned, Congress has chosen not to enact a nationally-uniform rate ceiling, but has rather deferred such rate-making to its historic author—the State.

The District Court below spoke of the evenhandedness of the Oklahoma law in question, pointing out "It imposes *exactly* the same burdens on in-State sellers as upon out-of-State sellers." (Emphasis added) *Aldens, Inc.* v. *Ryan* (A-14). The accuracy of the contention that the application of the Oklahoma law in question is non-discriminatory in its effects on commerce is not at issue here.

When confronted with the admittedly difficult task of determining the Commerce Clause constitutionality of a local regulation by weighing the burden of that regulation on commerce against the interest of the State, this Court and other courts have variously referred to the burden as "impermissible," "serious," "undue," "excess," or "threatening." The use of these modifying adjectives clearly connotes what this and other courts have long recognized—the imposition by local regulation of a *mere* burden on interstate commerce is not sufficient, in and of itself, to render that regulation unconstitutional. Rather, a certain degree of burden will be tolerated, the extent of which is determined by the nature of the local interest involved,

and the local regulation will be upheld ". . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church,* 397 U.S. 137, 25 L.Ed.2d 174, 90 S.Ct. 844 (1970).

Respondent does not now, nor has he ever contended the imposition of Oklahoma's maximum interest rate ceiling on Petitioner's Oklahoma credit accounts does not constitute a burden. What is urged, however, is that the imposed burden is, first, one which was undoubtedly a matter of which notice was taken and a balance struck when Congress expressly deferred interest rate-making to the States.

Primarily, however, Respondent asserts that the burden arising from the imposition of Oklahoma's maximum interest rate ceiling on Aldens' credit accounts is clearly not excessive, is indeed slight when compared with the sovereign interest of this State in protecting her citizens from potential abuses by extenders of credit. The Tenth Circuit Court of Appeals, thus, accurately and properly upheld the constitutionality of the Oklahoma law at issue by using the *Packel* Court's analytical matrix, and by recognizing that Oklahoma's protective interest in her citizens overshadows the slight burden on interstate commerce imposed by the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner herein has presented no issues worthy of discretionary review by this Court, and therefore, its petition should be denied.

Respectfully submitted,

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